

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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JUN 14 1995  
FEDERAL COMMUNICATIONS COMMISSION  
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In re	:	
Review of the Financial Interest and	:	MM Docket No. 95-39
Syndication Rules,	:	
Sections 73.659 - 73.663	:	
of the Commission's Rule	:	DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF KING WORLD PRODUCTIONS, INC.**

King World Productions, Inc. ("King World") submits these comments in reply to the submissions of certain other parties. Not surprisingly, the traditional networks (ABC, CBS and NBC) contend for repeal of the remaining elements of the fin/syn restrictions. It is surprising that they have so little new to offer in support of that position. The poverty of factual and analytic support for repeal of the remaining fin/syn provisions concerning first run programming--the only elements of the rules addressed in our initial comments and these reply comments--is particularly striking. This telling silence makes the point that our comments urged upon the Commission: The fin/syn restrictions concerning first run programming must be analyzed separately from those concerning off-network programming.

The networks rely substantially on the presumption in favor of complete repeal of the remaining fin/syn restrictions voiced by the Commission in its Second Report and Order in this docket. 8 F.C.C.R. 3282, 3340 ("based on the evidence available to us today, we are prepared to presume that complete removal of all remaining restrictions will be appropriate . . ."). The networks do little, however, to buttress this presumption.

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The Commission, in 1993, summarized its assessment of the relevant facts as they had been found in 1991:

(1) local broadcast stations need an unimpeded supply of first-run programming to compete with network and off-network programming in various non-prime-time periods; (2) allowing the networks into first-run syndication could enable them to exploit their owned and operated stations and their web of affiliates serving the entire United States to handicap the launch of new first-run programs by independent syndicators, which would be detrimental to the maintenance of a diverse, competitive marketplace; (3) allowing the networks into first-run syndication could undermine the objectives of the prime time access rule; and (4) by virtue of the market structure, network involvement in first-run syndication could diminish the amount of independent first-run programming aired on local television stations.

Second Report and Order, 8 F.C.C.R. at 3329 (footnote omitted). All of this remained true in 1993, though the Commission added to these facts a conditional prediction:

We continue to be concerned with these matters, although we are prepared to recognize that the need for restrictions could, if present trends continue, abate in the near future.

Id.

Each of the networks recites “facts” about increases in non-broadcast vehicles for the delivery of video programming and decreases in network program viewership. They say precious little about the relationship--obscure enough in the Commission’s articulation--between these “trends” and the presumed abatement of the need for the remaining first-run fin/syn restrictions.

The NBC comments say literally not one word on this subject. CBS advances one argument pertaining to first-run programming:

The sales practices of these independent syndicators--which include Paramount/Viacom and Twentieth Television (Fox), among others--do not reflect network influence or direction, but it is worth noting that there is no indication that any "network-owned program is syndicated primarily to that network's affiliates."

Comments of CBS Inc., 16 (footnote omitted). Although this observation may be consistent with the proposition that the rules currently in effect work, it does not demonstrate any more than this.

The comments of ABC at least try to establish a reason for eliminating the fin/syn restrictions in application to first-run programming. The argument is primarily based not on facts, but economic logic. ABC argues that it is against the economic interests of networks to impose network-syndicated first-run programming on themselves (through their owned stations) or their affiliates because, if more attractive programming is available from independent syndicators, it will be "snapped up by competitors" to the disadvantage of the networks. Comments of Capital Cities/ABC, Inc., 15.<sup>1/</sup> Thus, the argument has it, network-syndicated programming will compete with other available programming only on the strength of the respective merits of the offerings.

There is one elemental shortcoming to all of this: The argument, in assuming the continued existence of high quality first-run programming syndicated by entities other

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<sup>1/</sup> The same argument is made again with regard to network affiliates at 16-17.

than the networks, neglects the Commission's finding that "allowing the networks into first-run syndication could enable them to exploit their owned and operated stations and a web of affiliates serving the entire United States to handicap the launch of new first-run programs by independent syndicators. . . ." Although the imposition by the networks of inferior first-run syndicated programming on the television market may have the short-run consequences attributed to that course of conduct by ABC, in the not very long run the scheme would be very profitable to the networks. If the networks are able to stifle competition in the way described by the Commission in the passage quoted above, there will be no competing first-run product to be "snapped up" by anyone. The field will be reserved to the networks, which might compete with one another in the first run market, but will be free of the constraining presence of independent first-run syndicators. That is not a development that the FCC should encourage.

The outcome described above is the less diverse world into which assumptions and presumptions that are not soundly grounded in fact can lead. The fact--as the Commission has found it--is that networks do have power to force their affiliates (including, most obviously, the stations that they own) to broadcast first-run programming syndicated by them. Economic self-interest does not blunt that power; indeed, it provides incentives for the abuse of that power. Nothing in the comments of the networks establishes the existence of a trend of attenuation of that power, nor has the FCC located any such trend.

There may be some prospect for such a trend. It may be reasonable to posit that, at some level of competition among networks, the contest for affiliates will sufficiently curb network power to force affiliate purchases of first-run syndicated programs to make

the first-run fin/syn restrictions unnecessary. Three networks and an emerging network do not, as the Commission found in the Second Report and Order, provide the necessary level of competition. Further development of the UPN and WB networks may provide a “natural” market defense to network abuse of what will become their decreasingly unique position in the distribution of video programming. This is not, however, a trend adequately developed today.

There is a very different trend that does warrant attention. The networks base their argument for the extinction of the remaining fin/syn rules at least in part on pleas of poverty. The economic trend seems in reality to be going in a distinctly different direction:

Ad buyers likely will break last year’s bank in writing checks for this year’s prime time upfront market, estimated to hit a record \$5.1 billion-\$5.3 billion, nearly an 18% gain over last year’s record \$4.6 billion.

Broadcasting and Cable, June, 1995 at 9.

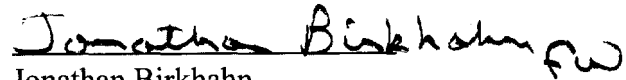
The networks wrongly argue that source diversity is diminished by the remaining fin/syn restraints on their entry into first-run syndication. The networks are completely free, under the existing rules, to produce as much first-run programming as they wish. The power to vertically integrate syndication with program production should not change the amount of first-run network programming produced. The networks have not argued that the independent syndicators upon which they must rely for distribution services under the current rules have the market power to exact super-competitive commissions. Nor have the networks offered any meaningful demonstration of their power to perform the syndication function at a super-profitable level. Thus, network incentive to produce

first-run programming should be altered not at all by a change from independent to internal syndication, nor will source diversity be enhanced by the elimination of the remaining first-run programming fin/syn rules.

One could argue, as the Commission seems implicitly to have done, that the remaining first-run syndication restrictions within the fin/syn rules are bad because they are restrictions on the free operation of a market. That is too facile. Market restraints are entirely appropriate where their benefits exceed their costs. Having found that the networks have the power to distort the first-run syndicated programming market by causing their owned stations, and forcing their affiliates, to purchase programs that they otherwise would not, the rules have an intrinsic value. This is so even if one assumes, as the Commission appears to have done, that the likelihood of the networks' use of this power is small. The cost of this protection against market distortion is zero, or something very closely approaching it. Because the vertical integration of production and syndication functions cannot be said to induce network production of more first-run syndicated programming, no source diversity is lost by prohibiting that integration.

All told, the fin/syn rules applicable to first-run syndicated programming are a remarkably elegant structural safeguard against the possibility of network abuse of their unique position. Those rules should be retained.

Respectfully submitted,

A handwritten signature in black ink that reads "Jonathan Birkhahn" followed by a stylized flourish.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of the foregoing Reply Comments of King World Productions, Inc. to be mailed by first-class mail, postage prepaid, this 14<sup>th</sup> day of June 1995, to:

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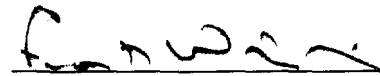
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A handwritten signature in black ink, appearing to read "N. Frank Wiggins", positioned above a horizontal line.

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